

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Dev Con Builders,
Inc., License No. 20356327

FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION

The above-matter came on for a hearing before Administrative Law Judge Kathleen D. Sheehy on January 24, 2006, at 1:30 p.m. at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The hearing record closed on February 13, 2006, upon receipt of the Department's post-hearing submission.

Michael J. Tostengard, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared for the Department of Labor and Industry (the Department).

Jeffrey H. Olson, Esq., Dudley & Smith, P.A., 2602 US Bank Center, 101 East 5th Street, St. Paul, MN 55101-1896, appeared for Dev Con Builders, Inc. (Dev Con or Respondent).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommended Decision. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the

record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

1. Did Respondent engage in unlicensed residential building contractor activity, in violation of Minn. Stat. § 326.84, subds. 1 and 1a?

2. Did Respondent engage in a fraudulent, deceptive, and dishonest practice in failing to comply with correction notices issued by the City of Foley and by failing to obtain a certificate of occupancy for the DeGroat home, in violation of Minn. Stat. § 326.91, subd. 1(2)?

3. Did the Respondent perform in breach of contract by failing to properly complete the DeGroat home, in violation of Minn. Stat. § 326.91, subd. 1(4)?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Dev Con is a small building contractor located in Gilman, Minnesota.^[1] Jill Jochum is the President and Chief Executive Officer of Dev Con, and Jeannette Gapinski is the general manager and license holder.^[2] The company incorporated in 1995 and mainly does framing, roofing, and finishing work as a subcontractor for several large home builders in the metropolitan area.^[3]

2. On December 22, 2002, the Department of Commerce issued a residential building contractor license to Dev Con. Dev Con's intention was to build a house on land it owned at 450 Norway Drive in Foley, Minnesota. The plan was to work on the house when Dev Con was not busy with other contract work and to sell it upon completion. This was Dev Con's first and only venture into the business of home building.^[4]

3. On March 28, 2003, Dev Con obtained a building permit from the City of Foley and commenced construction on the house shortly thereafter.^[5]

4. On March 31, 2003, Dev Con's residential contractor licensed expired.^[6]

5. On May 3, 2004, Dev Con filled out an application to renew its license and mailed the application and check to the Department of Commerce. A week or two later, the application was returned for a missing signature. Jeannette Gapinski signed it and mailed it back to the Department.^[7]

6. During the course of construction the building inspector for the City of Foley performed all required inspections on the footings, framing, plumbing/heating, and insulation, and a state inspector did the electrical inspection. The inspectors found the house met code requirements and passed all of these inspections.^[8]

7. On June 25, 2004, Dev Con entered into a purchase agreement with Cynthia DeGroat in the amount of \$165,000. The home was not completely finished at the time. The purchase agreement called for a closing date of July 15, 2004. It provided in relevant part that Dev Con and the buyer were to do a final walkthrough, prior to closing, to determine whether all items were completed to the buyer's satisfaction.^[9]

8. On July 22, 2004, the day before the closing, David Gapinski (Jeanette Gapinski's husband, who is a finish carpenter) walked through the property with DeGroat. There were still several items that were not completed, including a missing bi-fold door for a closet, some trim that needed to be stained, and missing cabinet doors. DeGroat made her own punch list.^[10]

9. On July 22, 2004, the inspector for the City of Foley was there for what was scheduled to be the final inspection, although she stayed for just a few minutes. The inspector said that the builder needed to complete the grading in the yard and plant a larger tree, as required by city ordinance. She said she would return the next day to sign off on the final inspection. The yard was graded and the tree was planted by the time of the closing.^[11]

10. At the closing the next day, DeGroat's realtor suggested that \$1,000 be held in escrow by the title company to ensure the completion of the items on DeGroat's punch list.^[12] The agreement called for dispersal of the funds to Dev Con upon completion of the work by August 10, 2004.^[13] The funds were escrowed pursuant to this agreement.

11. By August 23 or 24, 2004, there were still a few items to be completed.^[14] On September 10, 2004, Dev Con and DeGroat met to discuss replacing the driveway, which had begun to chip and scale and needed to be repaired or replaced.^[15] Dev Con told her that the concrete subcontractor would either repair the driveway to her satisfaction or replace it in the spring. In addition, some sheetrock on the garage ceiling was coming down. At about this time DeGroat began to believe that there were problems with the home that were not just a matter of being unfinished. Her realtor contacted the city inspector and learned that no Certificate of Occupancy had been issued for the home.^[16]

12. On September 17, 2004, the Department reinstated Dev Con's residential building contractor license.^[17]

13. Between September and December 2004, DeGroat allowed Dev Con to have only limited access to the home. During this time, some cabinet doors were attached, a drawer was varnished, some painting was done, and some scratches on trim pieces were stained.^[18] The inspector for the City also questioned the ice protection and flashing on the roof and why the roof truss specifications were not on site.^[19]

14. Both DeGroat and Dev Con contacted the Minnesota Department of Commerce regarding this matter.^[20] In December 2004, Dev Con contacted Fred Driver, an employee of the Minnesota Department of Administration, Building Codes & Standards Division, to request that someone from the state perform an inspection of the home. Dennis Lockwood subsequently performed the inspection and found a number of code violations, including failure to use anchor bolts in the garage and possibly in the house foundation, improper framing in the garage, failure to install roof underlayment all the way to the edge of the roof, and problems with blocking of the floor joist and trusses in the lower level.^[21]

15. On January 31, 2005, the City building inspector issued a correction notice to Dev Con that required a written response by February 6, 2005, outlining the action that Dev Con would take in response to the notice and providing a timeframe for completion of each repair.^[22]

16. Dev Con did not provide a written response to the correction notice by February 6, 2005; however, Dev Con offered to buy the home back from DeGroat. DeGroat then hired an attorney, who retained a consultant to inspect the home. The consultant noted the same code violations previously identified by Dennis Lockwood, and also pointed out what he viewed as a lack of workmanship in the interior drywall and the exterior stone.^[23]

17. In February 2005, Dev Con attempted to perform some of the repairs identified in the correction notice, but DeGroat would only allow them to enter the home when she was there, which meant that no work could be performed on weekdays while DeGroat was at work.^[24] Dev Con hired a sheetrocker to cover foam plastic on the footings in the lower level, as required by the correction notice, and the sheetrocker agreed to work on Saturdays when DeGroat was there. He worked for three Saturdays in February 2005. Other subcontractors who arrived to work on the home during this timeframe were turned away.^[25]

18. In February 2005, Dev Con also hired Duffy Engineering in St. Cloud, Minnesota, to develop a plan and specifications for replacing the roof truss in the garage.^[26]

19. On April 5, 2005, after receiving a letter from the Foley City Attorney, Dev Con responded to the correction notice in writing, identifying the items that had been

completed, identifying the timeframe for completion of the rest, and noting the fact that it had been difficult to obtain access to the house.^[27]

20. On April 20, 2005, Dev Con attended a meeting with city officials and their attorneys to discuss how a certificate of occupancy might be obtained for the home.^[28] Pursuant to those discussions, Dev Con contracted with Duffy Engineering to prepare a plan for correcting the structural defects. Duffy Engineering's report and drawings were completed by May 6, 2005, and Dev Con forwarded this information to the city building inspector on May 11, 2005.^[29]

21. The city building inspector approved the proposal on May 25, 2005, and authorized Dev Con to commence the correction work as soon as possible.^[30]

22. On June 1, 2005, Dev Con contacted DeGroat's lawyer seeking dates on which the company could have access to the property to complete the repairs. Dev Con estimated that it would require three days to complete the work.^[31]

23. On June 21, 2005, DeGroat's lawyer informed Dev Con that she would not permit Dev Con to perform any work on her home and that she intended to hire a different contractor to complete the work.^[32] DeGroat would not permit Dev Con's subcontractor to replace the driveway either.^[33]

24. The City thereafter informed DeGroat that the code violations had to be corrected and a certificate of occupancy issued by August 1, 2005, or she would face eviction from the home. During the summer of 2005, DeGroat hired another contractor to correct the code violations at a cost of \$14,400. The city issued a Certificate of Occupancy to DeGroat on August 24, 2005.^[34]

Procedural Findings

25. On June 6, 2005, the Commissioner issued a Notice and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges, which was served on the Respondent June 21, 2005.

26. At the Respondent's request the prehearing conference was continued from July 22, 2005, to August 1, 2005. At that time the hearing was scheduled to take place January 5, 2006.^[35]

27. The parties jointly requested and received a continuance of the hearing from January 5, 2006, to January 24, 2006, so that the parties would have time to prepare a written stipulation of fact.^[36]

28. The hearing was held as scheduled on January 24, 2006.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 45.027, 326.91, and 14.50.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department has complied with all procedural requirements of law.

4. The Department must prove by a preponderance of the evidence that the alleged violations occurred.^[37]

5. The Commissioner may take action against a residential building contractor's license if the Commissioner finds that the order is in the public interest and the licensee has violated or failed to comply with any provision of Minn. Stat. §§ 326.83 to 326.98.^[38]

6. Residential building contractors must be licensed by the Department.^[39]

7. The Respondent engaged in unlicensed residential building contractor activity between March 31, 2003, and September 17, 2004, in violation of Minn. Stat. § 326.84. During this period of time the Respondent constructed and sold the home to DeGroat.

8. Minn. Stat. § 326.91, subd. 1(2), prohibits residential building contractors from engaging in fraudulent, deceptive and dishonest practices. Performing any construction without obtaining applicable local building permits and inspections is a fraudulent, deceptive, or dishonest practice.^[40] The State Building Code requires both a final inspection and issuance of a certificate of occupancy.^[41]

9. Respondent did not engage in a fraudulent, deceptive, or dishonest practice in failing to timely comply with the correction notice issued by the City of Foley.

10. The Respondent did engage in a fraudulent, deceptive, or dishonest practice in failing to obtain a final inspection and certificate of occupancy for the DeGroat home.

11. The Commissioner may take action against a residential building contractor's license if the Commissioner finds that the order is in the public interest and the licensee has performed negligently or in breach of contract, so as to cause injury or harm to the public.^[42]

12. In every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee that during the one-year period from and after the warranty date the dwelling shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards.^[43] This warranty is an implied warranty imposing an affirmative obligation upon home improvement contractors.^[44]

13. The Respondent performed its contract for the sale of the dwelling to DeGroat in breach of the statutory warranties, in violation of Minn. Stat. § 326.91, subd. 1(4). The dwelling was not free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards.

14. An Order imposing discipline against the Respondent's license would be in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner take disciplinary action against Dev Con's license.

Dated this 2nd day of March, 2006.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape-Recorded (three tapes);
No Transcript Prepared.

MEMORANDUM

The Department has alleged that the Respondent's failure to comply with the January 31, 2005, correction notice issued by the City of Foley constitutes a fraudulent, deceptive, or dishonest practice. The Respondent did not respond in the manner requested until April 2005; however, it did attempt to correct some of the work, and eventually planned to do the rest in a manner that was ultimately acceptable to the City, but not to the homeowner. Although Dev Con's response was untimely and incomplete, and the intervention of the city attorney was required to elicit a comprehensive response, there is no evidence that Respondent defrauded, deceived, or dishonestly represented anything to the city or the homeowner in connection with the correction notice.

K.D.S.

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- [1] Stipulated Facts ¶ 1.
- [2] Testimony of Jill Jochum; Testimony of Jeannette Gapinski.
- [3] Testimony of Jill Jochum.
- [4] *Id.*
- [5] *Id.*; see also Stipulated Facts ¶ 2.
- [6] Stipulated Facts ¶ 1.
- [7] Testimony of Jill Jochum.
- [8] Testimony of Jill Jochum.
- [9] Ex. A, Stipulated Facts.
- [10] Testimony of Cynthia DeGroat; Testimony of David Gapinski.
- [11] Testimony of Jeanette Gapinski.
- [12] Testimony of David Gapinski, Jeannette Gapinski.
- [13] Testimony of Cynthia DeGroat. There is a written agreement reflecting the terms of the escrow arrangement and the contents of the punch list (see Testimony of Cynthia DeGroat), but it was not offered or received in evidence.
- [14] Dev Con maintains that it had completed five of approximately eight items on the original punch list by this time, but that DeGroat kept adding to it after September and asking for work above and beyond what was agreed at the closing. As neither party could remember exactly what the original items were, and as no one offered the relevant documents from the closing into evidence, the Administrative Law Judge has no basis for determining which version of events is more accurate.
- [15] Testimony of Cynthia DeGroat.
- [16] Testimony of Cynthia DeGroat.
- [17] Stipulation of Fact ¶ 1.
- [18] Testimony of Jill Jochum.
- [19] Stipulated Facts, Ex. B.
- [20] Stipulated Facts ¶ 5.
- [21] Stipulated Facts ¶ 6 and Ex. C.
- [22] Stipulated Facts Ex. C.
- [23] Stipulated Facts, Ex. D.
- [24] DeGroat offered to stay home from work during the week, but insisted that if she did so, Dev Con should be required to pay her the wage she would have earned by going to work. See Testimony of Cynthia DeGroat, Testimony of Jill Jochum.
- [25] Testimony of Jill Jochum.
- [26] Stipulated Facts, Ex. G (specifications dated 2/17/05).
- [27] *Id.*, Exs. E & F.
- [28] Stipulated Facts ¶ 9.
- [29] Stipulated Facts Exs. G & H.
- [30] *Id.*, Ex. I.
- [31] *Id.*, Ex. J.
- [32] *Id.*, Ex. L.
- [33] Testimony of Cynthia DeGroat.
- [34] Stipulated Facts ¶ 13; Testimony of Cynthia DeGroat.
- [35] Prehearing Order, August 2, 2005.
- [36] Second Prehearing Order, January 4, 2006.
- [37] Minn. R. pt. 1400.7300, subp. 5.
- [38] Minn. Stat. § 326.91, subd. 1(5).
- [39] Minn. Stat. § 326.84, subds. 1 and 1a.
- [40] Minn. R. 2891.0040, subp 1H.
- [41] Minn. R. 1300.0210, subp. 6J; Minn. R. 1300.0220, subp. 1.
- [42] Minn. Stat. § 326.91, subd. 1(4).
- [43] Minn. Stat. § 327A.02, subd. 1(a).
- [44] *Id.*, § 327A.08(c).